No. 590

In the Supreme Court of the United States

OCTOBER TERM, 1947

HARRIS KENNEDY, ET AL.,

Petitioners,

vs.

SILAS MASON COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF RESPONDENT TO THE BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 590

HARRIS KENNEDY, ET AL.,

Petitioners,

vs.

SILAS MASON COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF RESPONDENT TO THE BRIEF FOR THE UNITED STATES

THE ISSUE RESTATED

There are many things which might be said of the brief which has been filed in this case by the Solicitor General. That he should support a claim which, if it succeeds, will have to be paid by the Government is remarkable enough; that he should do so over the protest of the Department directly responsible for the transaction out of which the

claim arose is extraordinary;[1] and that he should do so in the teeth of decisions of federal courts in all parts of the country, including three appellate courts, is little short of astonishing.[2]

But all of these circumstances seem of minor importance beside the fact that the brief of the Solicitor General fails to discuss the real issue in the case. This court is not

---

[1] The Department of the Army strongly urged the Department of Justice to support the position taken by the respondent in this case. What is more, the Assistant Secretary of the Army submitted to the Solicitor General the record and brief in a case arising under identical circumstances which is now pending on appeal in the Eighth Circuit. That case is *Aaron v. Ford, Bacon & Davis, Inc.*, No. 13,660—Civil, and some of the pertinent facts set out in that record may be found in the opinion filed by District Judge Lemley in the companion case of *Barksdale v. Ford, Bacon & Davis, Inc.* (E.D. Ark.), 70 F. Supp. 690 (1947). In view of the facts so clearly and forcibly presented by the record and brief in the *Auron* case, it is difficult to understand how the Solicitor General found it possible to make some of the arguments advanced in the brief which he has filed in this case. It will not do to say that these facts are not in this record. As will hereafter be shown, they are embodied in official instructions and documents applicable to all cases of this character.

[2] The attempt made in the Solicitor General's brief to show that the Fifth Circuit stands alone against an overwhelming array of authority is based on a complete misconception of the issues involved in this case. The Second Circuit has reached an identical result on a similar state of facts. See *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (1947). The decision of the Ninth Circuit in *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (1938), on a related question is in accord. Among many District Court decisions *Lynch v. Embry-Riddle Co.*, (S.D. Fla.), 63 F. Supp. 992 (1945); *Barksdale v. Ford, Bacon & Davis, Inc.* (E.D. Ark.), 70 F. Supp. 690 (1947); and *Young v. Kellex Corp.*, 14 C.C.H. Labor Cas. 64, 244 (E.D. Tenn. 1948), may be selected as typical. The dictum to the contrary in *Bell v. Porter* (C.C.A. 7), 159 F. (2d) 117 (1946), was wholly gratuitous, as the parties there had stipulated that the complaining employees were covered by the Act. See *Bell v. Porter* (N.D. Ill.), 66 F. Supp. 49, 53 (1946).

now called upon to determine what is or is not "commerce" in the constitutional sense, nor need it decide whether the Taft-Hartley Act may regulate labor disputes at Oak Ridge or the Wagner Act reach unfair labor practices at a gold mine, nor are petitioners here asking the Court to write any far-reaching exemption into the Fair Labor Standards Act. They are simply asking affirmance of the judgment below on the narrow issue presented by this record which may be shortly stated as follows:

The Act of July 2, 1940, Chapter 508, 54 Stat. 712, authorized the War Department, in the execution of the National Defense Program, to construct new facilities for the development, manufacture, maintenance and storage of military equipment, munitions and supplies and to provide for the operation and maintenance of such facilities "either by means of Government personnel *or through the agency of selected qualified commercial manufacturers under contracts entered into with them*". [Italics supplied] In order to supply the armed forces with munitions needed for combat, the War Department built on Government-owned property a facility known as the Louisiana Ordnance Works, designed for the loading of shells and bombs, and contracted with the respondent to operate that facility under the direction of a representative of the Chief of Ordnance. Were the provisions of the Fair Labor Standards Act applicable to the employees engaged in that operation?

That is the question which the lower courts answered in the negative. It is submitted that when the provisions of the Act of July 2, 1940, and of the Fair Labor Standards Act of 1938 are read together, and when to each is given their proper effect, the correctness of the conclusion reached below is apparent. In this connection it may be helpful

if some outline is given of the circumstances which led to the passage of the Act of July 2, 1940, as well as to the exact nature of the arrangement made by the War Department with the respondent for the operation of the Louisiana Ordnance Works.

THE ACT OF 1940

When, in the early summer of 1940, it became apparent that a broad program of preparation for war had to be undertaken, the Chief of Ordnance took stock of the facilities available for the production of ammunition. At that time there was no private industry engaged in the production of large ammunition. The only source available was the Government arsenal at Picatinny, which was little more than a pilot operation.*

Obviously, expansion of facilities was imperative, but the question remained how the expanded facilities were to be operated. It was out of the question for the Ordnance Department to undertake to do so. The men who possessed the managerial skill to conduct such an enterprise were not in uniform, and there was no way to get them there, nor could they be induced to accept civilian employment. The rigidity of the classified service, the disqualifications attendant upon Government employment, and the

---

* Authority for this statement and others made in this section of the brief may be found in the book published by Major General Levin H. Campbell, Chief of Ordnance, entitled "The Industry Ordnance Team". See especially pages 101, et seq. Another valuable reference is the report made by Representative Albert J. Engel which was published in Army Ordnance Report No. 6, August 21, 1944, under the title "Ordnance Ammunition Production". See also "Shot, Shell and Bombs", Fortune Magazine, September, 1945. The most graphic account of the situation which existed in 1940 is to be found in a speech made at the Engineers Club of St. Louis on March 16, 1944, by Colonel T. C. Gerber, Field Director of Ammunition Plants. Excerpts from this speech will be found as Appendix A to this brief.

small compensation which could be paid were insurmountable obstacles. The only possible solution was to devise an arrangement which would preserve the essentials of Government control and direction without giving up the flexibility and freedom of private operation.

There was obviously no existing legal authority for carrying out such a program. At that time War Department procurement was rigidly controlled by statutory provisions and regulations designed to insure the maximum of competition. Such authority as existed for deviating from the straight and narrow path of advertisement for bids was strictly limited.[4] Moreover, any attempt to cross the line between Government and private operation of a Government-owned facility obviously required legislative sanction. The long struggle over the operation of the dam at Muscle Shoals indicates the nature of the issues involved in any such program.

The War Department, therefore, drafted and presented to Congress the legislation which later became the Act of July 2, 1940. The relevant portions of the text are as follows:

> "An Act To expedite the strengthening of the national defense
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War

[4] A general idea of the restraints which applied to War Department procurement in 1940, may be obtained by reading the provisions of Series 5 of the Army Regulations and particularly AR 5-50, 100, 140, 160, 200, 220, 240, 260, 300, 320, 349, 360. Most of these will be found in the Code of Federal Regulations (1938) Chapter VIII, Part 10.

Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; U.S.C. Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section:

Provided further, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

"(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, *either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them* [Italics supplied], and, when he deems it necessary in the interest of the national defense to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

"(c) Whenever, prior to July 1, 1942, the Secretary of War deems it necessary in the interest of the national defense, he is authorized, from appropriations available therefor, to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding 30 per centum of the contract price of such supplies or construction. Such advances shall be made upon such terms and conditions and with such adequate security as the Secretary of War shall prescribe."

"Sec. 4 (b) Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the

> Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

Upon this legislation and a similar Act applicable to the Naval Department, there was erected an entirely new form of economic activity dedicated wholly to the production of war material. By virtue of its provisions, an amalgamation of governmental and private activities was achieved which was quite outside of the scope of anything previously known to our institutions. Under Secretary of War Robert P. Patterson and Assistant Secretary of the Navy Ralph A. Bard described the situation strikingly in a Statement of Labor Policy issued by them on July 18, 1942, with the approval of William Green, President of the American Federation of Labor, and Philip Murray, Chairman of the Congress of Industrial Organizations. This statement is of such vital importance to the issues presented in this case that it has been reproduced in full as Appendix B to this brief.[5] Two paragraphs will bear reprinting:

> "Congress has charged the War and Navy Department with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves oper-

[5] The statement was later published in the War Department Labor Operations Manual issued by Headquarters, Army Service Forces, under date of 15 May, 1943. According to an article published in the New York Times on July 19, 1942, Messrs. Joseph A. Padway and Henry Kaiser, counsel for the American Federation of Labor, Mr. Lee Pressman, counsel for the C.I.O., and Mr. Allan S. Haywood, Organization Director of the C.I.O., participated in the preparation of this statement.

ating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

"All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. *These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.*" (Italics supplied.)

THE GOCO PLANTS

The Ordnance Department was a major participant in the program described in the paragraphs which have been quoted from the Statement of Labor Policy.[4] Indeed, as soon as the necessary legislative authority was available, the Chief of Ordnance proceeded with the development of what Colonel T. C. Gerber, the Field Director of Ammunition Plants, has described as "procedures for the joint management by industry and the Ordnance Department of the ammunition program".[5] At strategic locations throughout the country, facilities were erected designed to supplement the production of Government arsenals.[6] To provide for their operation, contractual arrangements were made with private firms which had special experience in recruiting, housing, training, and servicing great masses of men of varied skills who were engaged in the performance of a special task.[7]

The arrangements with these firms all followed a pattern prescribed by instructions issued by the Under Secretary of War and the Chief of Ordnance.[8]

---

[4] See Appendix A to this brief, (P. 32).

[5] See Appendix A to this brief, (P. 29). A complete list of all of these facilities will be found in Ordnance Procurement Instructions (paragraph 57.200.7). These instructions, which were issued from time to time by the office of the Chief of Ordnance, were given wide public circulation and may be found in the services published by Commerce Clearing House, Inc., and Prentice-Hall Corporation during the war years. They are hereinafter referred to as OPI.

[6] See Appendix A, (P. 29).

[7] The instructions issued by authority of the Under Secretary of War were known as War Department Procurement Regulations and were published from time to time in the Federal Register. The instructions issued by authority of the Chief of Ordnance were known as Ordnance Procurement Instructions. See Note 7, supra.

The outstanding features which were common to each arrangement were as follows:

1. The facility was in each instance located on Government-owned property which the Secretary of War had proclaimed as a military reservation.[10]

2. The military reservation and all activities conducted within its boundaries were under the control of a commanding officer designated by the Chief of Ordnance. This commanding officer was also designated as the contracting officer's representative for the purpose of administering the contract for the operation of the facility.[11] The duties of this officer included "safety and defense of the station (including Military Intelligence and Sanitation); preservation and proper application and use of public property; correction of irregularities and extravagances he may discover, or which may be reported to him; protection of the public interest in all matters relating to the administration of the contract and operation of the plant, works, or depot; certification of vouchers and purchase orders; and accountability and responsibility for public property".[12]

3. The entire plant and equipment were at all times owned by the Government.[13] Furthermore, all materials,

---

[10] See OPI Part 57, Section C, and particularly paragraph 57.200.7 which contains a complete list of establishments (including the Louisiana Ordnance Works involved in the present case) where the Federal Government had attained exclusive jurisdiction and over which the Chief of Ordnance retained responsibility in plant protection matters. Counsel have been informed by the Department of the Army that the Louisiana Ordnance Works was a reservation which contained 16,321.3 acres of land.

[11] See OPI paragraph 50,002.1.

[12] See OPI Section 50,002.1.

[13] This was true of the Louisiana Ordnance Works (R.21). In some instances the contractor which constructed and equipped the plant also operated. In other cases operation was conducted by contractors in plants previously constructed by the Government.

components and supplies which were used in the process of, or entered into, the completed product, belonged at all times to the Government and were in the possession of representatives of the Government before ever they came into the hands of the contractor. The contracts generally required the Government to furnish a large part of the materials, components and supplies required for the operation.[14] As to materials, supplies or components purchased by the contractor, the contract contained explicit provision that title should pass to the Government at the point designated by the contracting officer, and the contracting officer was specifically instructed to designate the point of origin.[15] Furthermore, all such items were, by War Department regulations, required to be shipped to the commanding officer (sometimes in this connection called the Ordnance Property Officer) at the plant, as consignee, at Government freight rates, on Government bills of lading, or on commercial bills of lading subsequently converted to Government bills of lading.[16] That officer thereupon became accountable for the items as Government property.[17]

4. All completed products were stored on the premises (that is to say, on the military reservation) or shipped by the Transportation Officer stationed at the plant to mili-

---

[14] Thus in the case of the Louisiana Ordnance Works, the Government was obligated to furnish all metal parts, explosives, and containers (R. 45).

[15] See War Department Procurement Regulations, Section 1182-C and OPI paragraph 50,105. Such a provision is to be found in the respondent's contract for the operation of the Louisiana Ordnance Works (R. 89, 101).

[16] See OPI paragraph 50,105.3.

[17] See War Department Technical Manual, TM 14-910 (Dec. 1, 1944) at pp. 4 et seq.

tary installations under forms of bills of lading prescribed by War Department instructions.[18]

5. The War Department had at all times complete control over the operations of the facility. It prescribed the specifications of the articles to be made, it determined the rate of production, and it dictated the method and manner of manufacture. Production orders were accompanied by detailed drawings and specifications and by a step-to-step manufacturing procedure.[19] All this was done by virtue of

---

[18] See OPI paragraph 54,005. See also War Department Technical Manual 55-550 and particularly the form of bill of lading shown on page 14 used for the shipment of completed products from the Kentucky Ordnance Works. In this connection the Army Service Forces Manual M-410 entitled "Vendor's Shipping Document" is also pertinent. The Solicitor General seeks to draw a contrary inference from certain provisions of the contract. See Government's brief, page 28, Note 15. But whatever the contractor might have been called upon to do by virtue of those contract provisions, the official instructions issued by the War Department make it perfectly clear that all shipments of completed products were made by the Transportation Officer as shipper.

[19] The extent of the control exercised is clearly shown in the following excerpt which is taken from Volume V, Historical Report, Army Service Forces, Office of the Chief of Ordnance, Field Director of Ammunition Plants, "History of the Loading Section", Period 1942 to September, 1945:

> "The tremendous job to be performed by the Loading Section might be better described by starting with the approval for line layouts, construction and completion of the loading lines including complete tooling. As each loading line was completed, a representative of the Loading Section was present for the pre-operation and inspection from an operation and safety standpoint. At this point, token schedules for various items of ammunition were issued to the loading plants. Together with these schedules, there was issued to the plants by the Loading Section complete loading instructions in the form of a letter of Detailed Instructions for new loading, consisting of all applicable drawings, standard practice sheets (later, these became Standard Practice Manuals) and special instructions. Through visits to the loading plants by the various personnel of the

contractual provisions under which the contractor agreed to operate the plant "as directed from time to time by the contracting officer and in accordance with the current applicable specifications to be furnished by him.[20]

6. The contracts established no production schedule and the contractor's compensation was in no case dependent upon the quantities produced. The contractor agrees to operate the plant as directed by the contracting officer, and the Government agrees to pay him, in monthly installments, a fixed fee.[21]

7. The wage policies to be followed by the contractor were determined by the War Department, primarily through the commanding officer at the plant as its representative.[22] After the passage of the Emergency Price Control Act, these policies continued to be determined by the commanding officer, subject to review by the War Depart-

---

Loading Section, technical advice was given on changes in equipment and line layouts and assistance in all loading problems. It was not unusual for the technical personnel of the Loading and Assembly Group to follow through to completion the loading of a pilot lot of ammunition and then proceed to the proving ground to observe its testing. After completion of proving ground testing, the representative of the Loading and Assembly Group in many cases would return to the loading plant to institute new loading changes or techniques required for regular production of quality ammunition or components." This is more fully developed in Volume I, General History, Office of the Field Director of Ammunition Plants, prepared by the office of the Chief of Ordnance. Excerpts from that publication will be found in Appendix C to this brief, (P. 38).

[20] Similar provisions are found in the respondent's contract (R. 44, 45).

[21] (R. 44, 46, 47, 62). In this connection, it should be noted that operations during the years 1944 and 1945 (during which petitioners claims arose) were conducted pursuant to express agreement that respondent would continue with the operation of the plant "as directed from time to time by the Contracting Officer, in accordance with production schedules" (R. 143, 167).

[22] See paragraph 8, Statement of Labor Policy, Appendix B, (P. 34). See also OPI paragraph 9,107 et seq.

ment and ultimately by the National War Labor Board or the Commissioner of Internal Revenue, as the case might require.[23] This control was much more than nominal. Before a single dollar was paid in wages, the contractor was required to submit to the commanding officer a job classification and wage rate schedule.[24] After approval, the contractor was required to comply literally with this schedule. The commanding officer could discharge any employee and could approve or disapprove the hiring or firing of any employee.[25] On certain types of employees specific written approval of the hiring and firing was required.[26] The hiring

[23] The relevant provisions of the Emergency Price Control Act are found in 50 U.S.C. Sec. 901-924. Executive Order 9250, as amended by Executive Order 9381 (8 Federal Register 13083) provided that the National War Labor Board should be the agency of the Federal Government authorized to carry out the wage policies stated in the order or the directives on policy issued by the Economic Stabilization Director under the order. Authority to pass on wage and salary adjustments of employees whose salaries were not fixed by statute was granted by the National War Labor Board to the Secretary of War by General Order No. 14, adopted November 24, 1942, as amended August 17, 1943, 8 Federal Register 11651. By the same General Order the National War Labor Board delegated to the Secretary of War, to be exercised on his behalf by the Wage Administration Section within the Industrial Personnel Division Headquarters, Army Service Forces (usually referred to as the "War Department Agency"), the power to rule upon all applications for wage and salary adjustments (in so far as approval thereof was a function of the National War Labor Board) covering civilian employees within the continental limits of the United States employed at Government-owned privately operated facilities of the War Department.

[24] See OPI paragraph 9,107, et seq. See also Appendix B, (P. 34).

[25] The Statement of Labor Policy found in Appendix B states that "the Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest". The standard contract provisions, to be found in respondent's contract, provided likewise (R. 76).

[26] See Circular No. 15, Headquarters, Army Service Forces, 17 March, 1943, subject: Auxiliary Military Police.

of every employee and all changes of status, either in classification or wage rate, had to bear the written approval of the contracting officer. In the absence of specific approval, no reimbursements could be obtained.[27] Checkers were maintained in clock houses where employees reported in and the Government audited and approved the time cards.[28] The Government even maintained men to observe payroll payments to the employees.[29]

8. The contractor had no financial stake in the contract. The Government agreed to bear all costs, and all expenditures were made from a fund advanced by the Government.[30] The contract sedulously shielded the contractor from any liability.[31]

9. The Ordnance Department assumed responsibility for plant protection, safety, and insurance.[32] In fact, the Safety Manual prescribed by the Ordnance Department contained detailed provisions regulating the conduct of employees, what they might carry, when and where they might smoke, the type of shoes to be worn, how to launder their uniforms, etc.[33] In this connection OPI 9,101.1 states that "the War Department has the responsibility to see that each plant is

---

[27] See OPI paragraph 9,107 et seq. See the provisions of the respondent's contract (R. 51, 116).

[28] See War Department Technical Manual 14-1000, Chapter 2, Section VI.

[29] See Manual for the Administration of Contracts, War Department, Office of the Chief of Ordnance, Fiscal Division Bulletin No. 8. See also Decision of Comptroller General B-22235, dated December 19, 1941.

[30] The standard provisions to be found in respondent's contract so provided. See (R. 51, 64, 116).

[31] See Article V-A, 1, (R. 54), and Article VII-A and B, (R. 70, 71).

[32] See War Department Procurement Regulations, Sections 332, 365.1; 365.1-A, 434, and OPI paragraphs 4060 et seq.

[33] See Ordnance Safety Manuals, December 1, 1941, and May 3, 1945.

operated in accordance with all laws and Executive Orders and in such a manner as to provide for the safety and protection of the plant and its personnel, and to insure maximum production at a reasonable cost."

10. The War Department could at any time terminate the contract and operate the plant with its own employees or through another contractor (R. 68, 120).

The arrangements made for the operation by the respondent of Louisiana Ordnance Works fell directly into the pattern which has been described. All of the characteristic features of the GOCO contract were present in this case. There was no deviation; indeed, under War Department instructions, none was possible. There were, it is true, certain provisions of the contract which were not entirely appropriate to the peculiar nature of the operation. The Solicitor General has made much of these in an effort to show that the relationship between the Government and the respondent was in no way unique. However, this attempt to make capital out of "boiler plate" provisions in the contract overlooks certain significant facts.

War Department contracting during the years from 1941 to 1945 was a mass production industry in itself. There was no time to make contracts to order with all the negotiation and haggling over draftsmanship which would inevitably be involved. It was necessary to devise standard contractual provisions and to require their inclusion without deviation. Inclusion of these provisions was at times mandatory.[34] In other cases the provisions were employed only when appropriate but in such cases had to be used without deviation.

---

[34] e.g. the Walsh-Healey clauses, the renegotiation clause, the termination clause, the inspection clause, from all of which the Solicitor General seeks to draw inferences. As to the mandatory character of these provisions, see War Department Procurement Regulations No. 3 *passim*.

The fact is that the basic features of the arrangement between respondent and the Government for the operation of the Louisiana Ordnance Works were identical with those which existed in the case of the Arkansas Ordnance Plant which was considered in *Barksdale v. Ford, Bacon & Davis, Inc.*, (E.D. Ark.), 70 F. Supp. 690 (1947). The findings of fact made in that case are, therefore, of special interest. See especially the following passage from the opinion of the court, at page 693:

> "The Arkansas Ordnance Plant was in its entirety the property of the United States. Practically all of the materials that went into the munitions were furnished by the Government and were shipped to the plant as the property of the United States, for military use. This included powder, metal and other materials that formed a part of the munitions. This was known as free issue material. The remaining materials, which were used in the main in the fabrication, packing and shipment of the munitions, were purchased by the defendant from outside sources, and all these materials became the 'property of the Government at the point of purchase, and were shipped from the point of purchase to the 'Ordnance Property Officer, care of Ford, Bacon & Davis, Inc., Arkansas Ordnance Plant, Jacksonville, Arkansas.' Thus the plaintiff was at all times working on goods of the Government, with machines of the Government, and on Government property, the title to which and the possession of which remained in the United States at all times. After these goods were worked on by the plaintiff, the United States shipped the same under Government bill of lading to military facilities outside of the State. If it can be said that the goods were in the constructive rather than actual possession of the Government while they were being processed, they were certainly in the actual physical possession of the Government when they were shipped. The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war."

ARGUMENT

I.

The Fair Labor Standards Act Construed in the Light of the Act of 1940 is Plainly Inapplicable.

It is not necessary to enter into a logomachy with the Solicitor General over the meaning of particular words or phrases in the Fair Labor Standards Act in order to demonstrate its inapplicability to the kind of operation which has been described in the preceding section.

One thing is plain enough: The GOCO operation bears no relation to the economy which the Fair Labor Standards Act was designed to regulate, nor could it have been productive of the abuses toward which the Act was directed. There was no possibility of the pressure of the unfair competitor willing to exploit his employees and thus to depress labor standards generally.

In fact, the situation created as a result of the passage of the Act of 1940 was in many respects *sui generis*. The contracts entered into by virtue of that Act inaugurated something entirely new. Since the Government remained in complete control of the wage policies followed by the contractors who were operating GOCO plants, there was no possibility of the payment of substandard wages or of working excessive hours except by direction, and with the full consent, of the Government itself. In the movement of shells and bombs across state lines, the element of competition with other goods was wholly absent. The Government was the only customer, and the interstate movement was for but one purpose, to arm the combat forces of the United States.

When Congress gave the legislative authority for this "new and unique tripartite relationship among Govern-

ment, labor and management", there is no doubt that the question of maintaining labor standards in connection with these operations was given careful consideration. Where the Secretary of War elected to operate Government-owned facilities by means of Government personnel, the provisions of Section 2(b) insured the payment of overtime for hours worked in excess of forty hours in any work-week. Where, on the other hand, the Secretary of War elected to operate the Government plant "through the agency of selected qualified commercial manufacturers", the situation was dealt with by the proviso intended to insure the continued application of the Walsh-Healey Public Contracts Act.[35] Congress thereby indicated its intention that labor standards should be maintained in all of these operations, whether conducted directly by the War Department or through private contractors.

In this connection the legislative history of the Act of July 2, 1940, is of some interest. As originally passed by the House, the bill contained no provision relating to labor standards.[36] As amended in the Senate, the bill contained the express provision that all contracts entered into by virtue of its provisions should be subject to the provisions of the Walsh-Healey Law.[37] In conference, it was realized that the effect of the Senate amendment would be to work a radical change in the prevailing labor standards in many industries to which the Act would be applicable, particularly the construction industry which for many years had been otherwise regulated. For this reason the conferees

[35] 49 Stat. 2036, 41 U.S.C. §35-45.

[36] See House of Representatives, Report No. 2261, 76 Congress, Third Session.

[37] See House of Representatives, Report No. 2685, 76 Congress, Third Session, "Statement of the Managers on the Part of the House."

modified the language to the form in which it was ultimately enacted.[36]

Thus it seems clear that Congress intended to prescribe in the Act itself, the labor standards to be applied in the new field of activity into which it was authorizing the War Department to enter. This intention to deal comprehensively with the entire subject seems clear when the Act is read in its entirety. It follows that the Fair Labor Standards Act of 1938 and the Act of July 2, 1940, are *in pari materia*, and must be read together. When this is done, it seems quite apparent that, putting aside for the moment the question whether the Fair Labor Standards Act could by its terms have any application, the Act of 1940 clearly intended to remove from the ambit of the prior law, the operations conducted by respondent at the Louisiana Ordnance Works.

United States v. Hutcheson, 312 U. S. 219 (1941), is directly in point. There this Court found that Congress, in enacting the Norris-LaGuardia Act, effectively removed certain activities of labor unions from the scope of the Sherman Act, although no explicit provisions to that effect could be found in the later statute. This Court said (at p. 235):

> "Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require

[36] See Note 37.

> as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' *Johnson v. United States*, 163 F. 30, 32."

See also the remarks of Judge LEARNED HAND in *United States v. Aluminum Company of America* (C.C.A. 2), 148 F. (2d) 416 (1945) at page 429.

But in addition to the principles so plainly stated in the *Hutcheson* case, there are other reasons for believing that this Court should not apply the Fair Labor Standards Act of 1948 to arrangements made under the Act of 1940. It is a familiar rule that a statute is to be read in the light of conditions existing at the time of its consideration and passage and is not to be mechanically applied to activities not then foreseeable. The recent case of *Atlantic Coast Line v. Phillips*, 332 U. S. 168 (1947) illustrates this rule in a very apt way. There, words in a statute exempting the railroad from taxation were held not to include an income tax subsequently imposed by the legislature. This Court pointed out that the meaning of the earlier statute could not be found unless it was "viewed as a part of the whole texture of local laws and of the economy to which they apply".

Here there can be no doubt that Congress, in 1937 and 1938, when the Fair Labor Standards Act was under con-

sideration, was dealing with an economy radically different from that which was inaugurated by the Act of July 2, 1940. No such improvisation as the GOCO plan could have entered the minds of the legislators. It required the spur of grim necessity applied to the imagination of resourceful administrators to produce such a phenomenon. These, it is submitted, are compelling reasons for concluding that respondent's activities in operating the Louisiana Ordnance Works for the War Department, were wholly outside the scope of the Fair Labor Standards Act.

In adopting the construction now urged, this Court will not be exposing employees of contractors who operated GOCO plants to the rapacity of unscrupulous employers. The provisions of the Walsh-Healey Act are sufficient to insure against any such result.[39] Apart from this statute, the control exercised by the Government over the wage policies at GOCO plants was in itself a sufficient guarantee of protection. In this connection, reference is made to the detailed provisions of the Statement of Labor Policy to be found in Appendix B (pp. 35-37). The policies there announced were made applicable to GOCO contracts through the administrative powers of the contracting officer and his representatives. Similarly, the provisions of Executive Order No. 9240,[40] which added a double time premium for work done on the seventh consecutive day, were applied in all GOCO plants.

II.

The Act Is Inapplicable According To Its Terms.

It would serve no useful purpose to repeat here the arguments which have been made in the brief previously

---

[39] The fact that the Act is not applicable under contracts under $10,000 need give no concern. All of these contracts were dealing with vastly larger sums.

[40] Code of Federal Regulations, Cum. Supp. Book I, p. 1207.

filed on behalf of respondent or in the briefs filed as *amici curiae* by a number of contractors. We think that they show that the petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. We especially endorse the argument advanced on behalf of E. I. duPont De Nemours & Company. The analysis there made of the legislative history of the Fair Labor Standards Act of 1938 and its progenitors seems to us to show conclusively that, independently of the effect of the Act of July 2, 1940, the Fair Labor Standards Act was never intended to apply to the manufacture from Government-owned materials, in Government-owned plants, of shells and bombs subsequently shipped by the Government to military installations.

A word, however, might be said about the attempt of the Solicitor General to escape from the exemption, plainly written into the Act, of goods which are in the actual physical possession of the ultimate consumer. That this exemption applies in literal terms to the goods produced in the Louisiana Ordnance Works can hardly be doubted. The goods were clearly in the physical possession of the Government before they crossed state lines. They were delivered to the Government, inspected, finally accepted, and shipped by a Government officer as shipper on Government bill of lading, at freight rates available only to the Government.

The Solicitor General argues that the proper construction of the statute does not exempt those producing goods which are delivered into the physical possession of the ultimate consumer prior to their movement across state lines. This argument is inconsistent with the legislative history of the Act as well as with its literal meaning. The real intention of the ultimate consumer provision was

clearly stated by Mr. Robert H. Jackson in testimony given on June 12, 1937, before the joint committee considering the Administration's draft of the Fair Labor Standards Act.[41] At that time, the bill contained no exemption of retailers, and Mr. Jackson was being pressed as to the applicability of the Act to small business men such as bakers and shoemakers whose products might move across state lines. The pertinent testimony is as follows:

> "*The Chairman.* * * *. Would you explain under just what circumstances and under what circumstances only, it would be possible for the regulation of retail establishments and small business enterprises to come under this bill?
>
> "*Mr. Jackson.* I will try to. It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the *pants presser and small business generally.* * * *.
>
> "* * *
>
> But then, there are only two ways in which a retailer, for example, would be affected by this bill as it now stands, * * *. One would be the retailer who is located close to a State line and sold his goods by delivery across a State line, and the other would be the case of a local retailer, who by his labor practices and standards was able to affect the interstate movement of goods. * * *.
>
> "* * *
>
> Practically, the situation in which a local merchant might be affected would be *if he* were moving his goods *in the course of delivery* across the State line to a substantial extent so that he were engaging in inter-

[41] Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong. 1st Session on S. 2475 and H.R. 7200, at page 35.

state commerce; but generally speaking, the policy of the bill is not to include the *service trades* and *small business* and the retailing enterprises.

"* * *

As a practical proposition, the bill does not affect the retail trades. (Italics supplied)."

The assurances of the Assistant Attorney General that retailers who did not themselves deliver across state lines would be exempted from the Act must have been based on the ultimate consumer clause as no other basis for them existed in the bill in its then form. These representations made to the Congress by a representative of the administration which had drafted the bill and arranged for its introduction should be given great weight.

The argument now advanced by the Solicitor General would limit the exemption in such a way as to destroy it. No express exemption was necessary to protect an innocent ultimate consumer moving goods across state lines from injunctive process and penalties. Nor is it to be supposed that Congress intended to immunize ultimate consumers who knowingly contributed to violations of the Act. To give the exemption meaning, it must, therefore, apply under the circumstances outlined by Assistant Attorney General Jackson.

The Administrator's rulings to the contrary are not persuasive. Interpretative Bulletin No. 5 is primarily based on the theory that a consumer who uses commodities in connection with the production or shipment of other goods for commerce is not the ultimate consumer. Thus "the ultimate consumer of a shoe box is not the manufacturer of the shoes, but the man who buys and wears the shoes". This is the ground on which the cases relied on by the

Solicitor General such as *Hamlet Ice Co. v. Fleming* (C.C.A. 4), 127 F. (2d) 165 (1942) are to be explained. That theory alone would restrict the exemption so narrowly as to make certain that no substantial body of employees would be denied the benefits of the Act. Thus for practical purposes the question for the Court here to decide is whether the Act is to be applied to Government purchases and transportation. Clearly, the provisions of the Walsh-Healey Act and of the Bacon-Davis Act[42] are adequate to care for employees concerned in the production of such goods.

But even if the contention of the Solicitor General that the Act exempts only employees of the ultimate consumer who perform work *after* the goods come into his physical possession could be sustained; the facts in this case still require the conclusion that the exemption applies. Not only were the materials from which these shells and bombs were produced at all times owned by the Government, but, under the circumstances which have been outlined, they were plainly in the physical possession of the Government. As has been shown, the great bulk of the materials and supplies were actually furnished by the Government. The balance were shipped to an officer of the Government as consignee, and that officer became immediately accountable for them as Government property. The extraordinary extent of the control exercised by the Government over the contractor during the loading process has already been shown. The case, it is submitted, is, in all essential respects, similar to that dealt with by the Second Circuit in *Divins v. Hazeltine Electronics Corporation*, 163 F. (2d) 100 (1947). The Solicitor General argues that the Government would then be the manufacturer of the article, but if so, it is exempt under Section 3 (d), compare *United States v. United Mine Workers*, 330 U. S. 258 (1947).

[42] 40 U.S.C. §321 et seq.

CONCLUSION

We are not asking this Court to give any weight to the fact that the petitioners are seeking to add to the already staggering cost of the recent war. Nor are we asking the Court to give consideration to the obvious fact that the compensation paid petitioners took fully into account the fact that they were expected, as were all others engaged in war production, to work overtime. Those are considerations not relevant here. We are asking only that the Court give effect to the Act of 1940, and that it construe the Fair Labor Standards Act in the light of its legislative history and in accordance with its express language.

Respectfully submitted,

WILLIAM L. MARBURY,
CHARLES D. EGAN,
Counsel for Respondent.

APPENDIX A

EXCERPTS FROM SPEECH ENTITLED "THE GOVERNMENT-OWNED AMMUNITION INDUSTRY IN THE UNITED STATES", DELIVERED BY COLONEL T. C. GERBER, FIELD DIRECTOR OF AMMUNITION PLANTS, BEFORE THE ENGINEERS' CLUB OF ST. LOUIS AND THE ST. LOUIS SECTION OF THE AMERICAN INSTITUTE OF MINING AND METALLURGICAL ENGINEERS 16 MARCH, 1944.

"In the 1940 world of uncertainty of daily crises, of mounting fears and terrors, what did we do about ammunition? The immediate problem was clear. The total production in the U. S. of smokeless powder and TNT which are basic in the manufacture of ammunition was about 100,000 pounds per day each, which is roughly the quantity sufficient to maintain an army of only 100,000 troops on the field of active combat for a single day. The existing facilities for the loading of new military ammunition consisted of two Government arsenals, one, Frankford Arsenal, for the manufacture of small arms ammunition, and the other, Picatinny Arsenal, for the loading of ammunition other than small arms. In addition to these arsenals certain depots were renovating old ammunition on a small scale. This is perhaps the appropriate place to make clear the difference between ammunition as I will speak of it tonight and small arms ammunition. Small arms ammunition consists of pistol, rifle and machine gun cartridges which are chiefly 45, 30 and 50 caliber. As distinguished from these items, the ammunition to which I refer consists of all types having a size greater than 50 caliber. This begins with 20mm ammunition and ranges upward to the 16 in. shell and the 4,000 pound and larger bomb. It includes bombs of all kinds, rockets, land mines, grenades, and other items.

"The capacity of the Government arsenals was not a capacity intended to meet the needs of war. They had

been traditionally laboratories for the technological improvement of ammunition, rather than factories for mass production. We had only one such Arsenal for large ammunition. Further, the production that was needed was inconceivable on any basis other than that of actual newly constructed capacity, for the estimated needs were many, many times any capacity that could be hoped for from the arsenals. The program for manufacture of ammunition became primarily a program for construction of ammunition plants because there were no facilities in existence which could give the desired production, and there were none which it was practical to adapt to such production, and there were almost no outside sources from which these quantities of ammunition could be obtained. The program called for the immediate construction of plants which could make military explosives and could load shell, bombs and other items with these explosives.

* * *

"With provisions made for the production of powder, explosives and allied chemicals, there still remained the task of actually assembling the metal parts made by thousands of private contractors, and filling these parts with the propelling and explosive charges. This necessitated the design of gigantic assembly plants, which we call loading plants, with production lines laid out to load and assemble fuzes, primers, boosters, shell, bombs, rockets, mines and many other items. Production lines at Picatinny Arsenal served as basic models, but modifications of design were necessary to adapt production to the vast scale required.

"Many of you may have visited TNT plants or loading plants. Those of you who have not, would probably be most impressed by the immense size of the area each covers, and the widely separated manner in which buildings are laid out. Both TNT and loading plants consist of lines or groups of buildings scattered over an area which in some cases is as great as 20,000 acres. None of the buildings are of great size, and most are of special construction, so that if an explosion should occur, damage to both per-

sonnel and property would be limited by distance and the lightness of the missiles. You may be interested in knowing that our plants are almost the safest places to work in the country, both as to frequency and severity of accidents. Of all the industries there is only one having a better safety record, the ladies garment industry.

"In May of 1940 the Ordnance Department was procuring materials of war at a rate of one million dollars per month. In May of 1943, we were procuring materials of war at a rate of one and a half billions per month, or 150,000 per-cent more than three years previously. In those three years, Ordnance procurement plans had expanded into a 65 billion dollar program; and the Ordnance Department was procuring materials annually, which were equal in value to one-half the total national income in 1932. Ammunition procurement has been a substantial part of the Ordnance program, involving the expenditure of approximately two billion, eight hundred million dollars in 1943.

"Prior to 1940, the Ordnance Department was a relatively small branch of an army still handicapped by many of the restrictions and curtailments of the pacifist philosophy of the 20's and 30's. Neither in numbers nor in the all-around ability required, was the existing personnel of the Ordnance Department, or of any other branch of the Government, capable alone of carrying out the tremendous industrial program which was necessary. If the skill for business administration on this gigantic scale existed anywhere, it was possessed by the leaders of industry who had successfully demonstrated their abilities as peace-time administrators and producers.

"It was to these leaders that the Ordnance Department turned for aid in the crisis that was at hand. In 1940, Major Gen. Levin H. Campbell, Jr., who is now Chief of Ordnance, was made Chief of the Facilities and Plant Administration Section, which had the mission of developing the facilities necessary to meet the ammunition program. General Campbell was, and is, a firm believer in the ability

of American Industry to meet the tremendous problems connected with preparation for war. He felt that the leaders of industry were the logical men to call upon for the practical development of our ammunition program. Accordingly, procedures for the joint management by industry and the Ordnance Department of the ammunition program were worked out and cost-plus-a-fixed-fee contracts for the operation of ammunition plants were negotiated with various large corporations.

"The names of these contractors are familiar to all of you—duPont, Hercules, Firestone Rubber, United States Rubber, Atlas Powder, Cities Service, and a host of others. People are often surprised to learn that among them are subsidiaries of the Quaker Oats Company, which has done a very good job in loading bombs, and of the Procter & Gamble Co., which has received the Army-Navy "E" for its excellence in the loading of ammunition. In addition to these great manufacturing corporations, several large construction engineering companies also went into the business of operating ammunition plants. Chemical Construction Corp., Silas Mason Co., Day & Zimmerman, Todd & Brown, Fraser-Brace, Sanderson & Porter, and Ford, Bacon & Davis are typical examples. These names alone will indicate clearly to you gentlemen the caliber of the business talent which went into the creation of the ammunition industry. In obtaining these contractors, the Ordnance Department depended more upon their patriotism than upon profit, and our experience under cost-plus-a-fixed-fee contracts has shown that profits are low both in actual amount and in relation to the nature and scope of the work performed.

"* * *

"The Ordnance Department, being a prime party to the contract, has in residence at every plant a nucleus of Ordnance Officers, with a staff of Ordnance civilians, administering these cost-plus-a-fixed-fee contracts in the interest of the Government and of the people. This staff has the dual function of seeing that the government provides its share of duties to enable the contractor to perform his mission

of producing high-quality ammunition in quantity, and of seeing that Government property and Government money are not abused or misused. In administering the contracts, the Ordnance Department had to consider the fact that vast quantities of high-quality ammunition were needed at once, and that the penalty for delay might be defeat.

"* * *

"In August, 1942, the Chief of Ordnance created a sub-office in St. Louis to exercise centralized control over the Government-owned ammunition plants which had been, or were being brought into production. These plants were to produce more than 95% of the ammunition manufactured for the War Department, as well as a substantial quantity for the Navy, and were to have their products shipped to every corner of the world for use by our own troops or as lend-lease aid by our allies. The plants were 60 in number, representing a capital investment of more than 2 billion dollars.

"* * *

"The Office of the Field Director of Ammunition Plants exercises administrative and executive control over those plants within the limits of the contracts. Officers and civilians who have literally 'grown up' with the plants and are familiar with every aspect of them assist with the technical problems and analyze the various administrative complications that develop at these enormous enterprises.

"Our office acts as a 'trouble shooter' for these plants. If the contractor is having trouble producing an item, an expert on that specific item will examine the manufacturing procedure and recommend changes which will correct the difficulty. If a special item of material or equipment is needed quickly, we expedite the request through the various Government control agencies in Washington.

"By 1943, almost all of these facilities were in production, and the problem had become one of control of production and administration, rather than construction."

APPENDIX B

STATEMENT OF LABOR POLICY GOVERNING GOVERNMENT-OWNED, PRIVATELY-OPERATED PLANTS.

Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if

he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.

Recognizing these facts, and desiring to preserve the greatest freedom of organization and collective bargaining by the employees which is compatible with the necessary discharge by the War and Navy Departments of their responsibility for maximum production and the safe and efficient operation of these plants, the War Department and the Navy Department have established the following labor policies to which the American Federation of Labor and the Congress of Industrial Organizations have agreed after assisting in their preparation. It is recognized that these policies do not cover all aspects of labor relations in these plants, and experience may indicate the desirability of modifying, adding to, or otherwise amending this statement of policy.

1. No employee or person seeking employment shall be discriminated against by reason of race, color, creed, or sex.

2. The recognition of an exclusive bargaining agent for the employees in any appropriate bargaining unit within any plant will be deferred until a majority of the estimated total of that unit has been hired, unless special circumstances shall justify an earlier designation of such exclusive bargaining agent. The War and Navy Departments will undertake to estimate with reasonable promptness the total employee complement of the appropriate unit.

3. While no recognition shall be accorded any organization as the exclusive representative of any group of employees until the proper collective bargaining agency shall have been determined under the conditions described above, provision will be made for the handling of grievances and other disputes, and the elimination of friction between employees and management during the period pending such determination. These procedures should be

approved by the representative of the Army or Navy in charge of operations at the plant.

4. Seniority shall be a determining factor in matters affecting layoff and reemployment, transfers, demotions and promotions only if other factors of ability and aptitude are equal.

5. (a) Discharges directed by the War or the Navy Departments for suspicion of subversive activities will be handled in accordance with the provisions of the "Joint Memorandum on Removal of Subversives from National Defense Projects of Importance to Army or Navy Procurement", dated January 10, 1942.

(b) Discharges directed by the Army or Navy Officer in charge in the interest of plant security will be handled in the following manner: (1) the Officer, or his representative will direct the contractor to suspend the employee in question immediately; (2) the employee will be advised in detail of the specific reasons for his suspension and of his right to a hearing; (3) if requested, a hearing will be held by the Officer, or his representative, within a reasonable period and at such hearing the suspended employee will have an opportunity to produce witnesses and present evidence and to be assisted by counsel; (4) based on such hearing, the Officer, or his representative, will direct the reinstatement (with authority to grant back pay) or the discharge of such employee; (5) an employee so discharged will have the right, upon request, to have his case reviewed by the War or Navy Department.

6. No agreement between the management and its employees, or their representatives, except those which affect the safety and health of employees, may be entered into, or action taken, which, in the opinion of either the Secretary of War or the Secretary of the Navy, will have the effect of restricting or hampering maximum output.

7. (a) Anti-sabotage, anti-espionage and plant protective measures, including access into the plant, approved or prescribed by the War and Navy Departments, or their

representatives, shall be binding upon management, employees, and their representatives.

(b) Measures designed to guard against sabotage, espionage, subversive activities and other plant protective measures which are ordered or approved by the Army or Navy representatives shall insofar as practicable be prominently posted throughout the plant and otherwise made available to employees. Violations of any of these rules or regulations shall be grounds for disciplinary action, including immediate dismissal.

8. (a) The War and Navy Departments in most instances, have contractual responsibility for the approval of all costs including payroll costs. These Departments therefore will from time to time jointly agree upon the policies to govern the exercise of these contractual responsibilities to approve or disapprove proposed wage scales at these plants.

(b) Before operations commence at any plant, the contractor will prepare a wage scale to apply upon the commencement of operations and submit the same for approval to the War or Navy Department through the local Army or Navy representative at the plant, who will forward these with their own comments regarding the appropriateness of the proposed scale. Any subsequent adjustments in the initial wage scale at any plant shall be worked out by the contractor and the employees through established procedures, provided only that the approval of the War or Navy Department must be obtained before such adjustments may become effective.

9. This statement of policy shall be applicable to all such plants except that where any provision of the statement conflicts with a provision in an existing contract, such contract will not be altered except by mutual consent.

APPENDIX C

EXCERPTS FROM VOLUME I, GENERAL HISTORY, OFFICE OF THE FIELD DIRECTOR OF AMMUNITION PLANTS, OFFICE OF THE CHIEF OF ORDNANCE, ARMY SERVICE FORCES, DATED OCTOBER, 1945.

"VII. PRODUCTION ASSISTANCE

"Early Technical Function of FDAP

"One of the functions which moved to St. Louis as an original part of FDAP was the Loading and Assembly section. This organization included officers and civilians familiar with ammunition loading, and with the design, construction and operation of loading lines. The early activities of this section were concerned with following the progress of construction, assisting in the initial equipment and operation of completed production lines, and aiding in the development of practices and procedures for improved loading methods.

"Scheduling Responsibilities

"Very soon after the office was established further functions connected with ammunition loading were transferred to St. Louis. One of these was the scheduling of production at specific plants. Under the established procurement procedure, overall requirements for the various types of ammunition are sent to the Field Director's office, and there broken down among the different plants. In deciding the quantities which would be scheduled for any single plant many factors had to be weighed, of which a few were the type of equipment at the plant, the availability of components, the state of the labor supply, the comparative efficiency of the plant, and a wide number of other points. When the schedules were such that new equipment or different tooling was required, the placement of

schedules had to be coordinated with the recommendations of technical experts who decided on the best location and methods for the desired changes.

"Regulating Functions

"FDAP has also performed the important task of regulating the flow of materials to the plants. Loading plants are primarily a series of assembly lines whose efficiency of operation is dependent entirely upon the coordinated arrival of all components and sub-assemblies at the right moment in each assembly line. It was complicated further by reason of the presence of explosives which limited in each sub-unit of the line the number of loaded sub-assemblies, the bulk explosives of the finished product. Thus there could be no stoppage within the line and the flow to the line had to be continuous and even. Metal parts were procured through the Ordnance Procurement Districts, while explosives were manufactured under the control of FDAP. In addition, loaded sub-assemblies had to be scheduled and regulated to the various final assembly lines by FDAP. Although metal parts were regulated, through necessity by the main office Ammunition Division in Washington, the flow of loaded sub-assemblies, the production schedules of explosive plants and the regulating of these explosives were coordinated completely by FDAP.

"Following Production Progress

"It was also the responsibility of technical experts in FDAP to follow the production progress of the plants. Reports on the quantities of ammunition loaded were received and studied, as well as reports on quality of the output, as shown by proving ground tests. When schedules were not being met, or when quality was shown to be poor on the basis of proving ground tests, the technical experts familiar with the particular item went to the plants and assisted in correcting the trouble.

"• • •

"Preparation of Standard Procedures

"An important contribution of FDAP to ammunition manufacturing has been the preparation by loading experts of standard procedures for loading the various types of ammunition. These procedures, worked out after much experience and observation, furnished a standard pattern for any contractor embarking upon production of an item he had not turned out before, and aided contractors who were already producing to make improvements in their methods.

"The technical experts of FDAP kept themselves readily available for trouble-shooting activities, and very frequently visited the plants to assist with problems. This method of direct contact also led to interchange of useful information among contractors.

"Storage and Warehousing

"Safety considerations, danger of deterioration, and the aim of low handling costs make the storage of finished ammunition and ammmunition components a major problem of the War Department. Extensive facilities were provided at each new plant. They became to some extent small field depots, and in consequence proposed the same problems as a depot. There were no typical storage drawings for many of the new rounds loaded at the plants. These were developed in conjunction with certain selected plants. These typicals were based on palletized loads wherever practicable to give greater speed of handling and maximum utilization of personnel. Space control was instituted by FDAP, so it was able to balance the storage load among all plants and works. Through periodic reports and direct contact, personnel qualified in storage and warehousing activities were able to keep the overall storage picture in proper focus, avoiding under-utilization of space at one plant and over-loading at others. Through cooperation with Field Service, Ordnance Department, untold millions of dollars and precious manpower were saved by shipping direct from the end of the assembly lines to ports of embarkation."